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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CAROL F. STEIN, as Trustee, etc.,

Plaintiff and Respondent,

v.

NORMA PEREZ EDWARDS BORSTEIN
et al.,

Defendants and Appellants.

B206504

(Los Angeles County
Super. Ct. No. BP106278)

APPEAL from an order to the Superior Court of Los Angeles County, Aviva K. Bobb, Judge. Affirmed.

Bunagan, Marapao & Valdez and J. Flores Valdez for Defendants and Appellants
Edgardo M. Lopez and Carlo O. Reyes.

Hinojosa & Wallet, Andrew M. Wallet and Rebekah E. Swan for Plaintiff and
Respondent Carol F. Stein.

Edgardo M. Lopez and Carlo O. Reyes appeal from the trial court's order denying their motion for attorney fees pursuant to Code of Civil Procedure section 426.16, subdivision (c),¹ following the voluntary dismissal by Carol Stein, Trustee of the Alfred J. Borstein Trust, as amended and restated on August 8, 2003, of her verified petition to establish title to personal property, filed pursuant to Probate Code section 850, et seq. Lopez and Reyes contend they are entitled to attorney fees as the prevailing parties because Stein's petition was not dismissed until after their meritorious special motion to strike had been filed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

1. Litigation Concerning the Estate of Alfred J. Borstein

Norma Edwards Borstein married Alfred J. Borstein³ in October 2003. Alfred, an elderly attorney with a \$15 million estate, had created the Alfred J. Borstein Trust of which he was trustee. The assets of the trust included Borstein Partners, Ltd., a California Limited Partnership, as well as real property in California, Arizona, Nevada and Hawaii. When Borstein Partners was formed in 1997, Alfred was the general partner

¹ Statutory references are to the Code of Civil Procedure unless otherwise indicated.

² The probate proceeding and special motion to strike at issue in this appeal are simply one facet of a series of lawsuits involving Norma Edwards Borstein, the widow of Alfred J. Borstein, on the one hand, and Stein, Alfred J. Borstein's niece, and other family members, on the other hand. Those cases have generated multiple appeals and writ petitions, several of which have resulted in written opinions by our colleagues in Division Four of this court. (See, e.g., *In re Norma Edwards Borstein* (Feb. 27, 2008, B202813) [nonpub. opn.]; *Borstein v. Stein* (June 20, 2008, B195762) [nonpub. opn.]; *Stein v. Goswami* (Dec. 16, 2008, B201735) [nonpub. opn.].) Although not necessary to resolve the issues before us, we have relied to a certain extent on those opinions to provide some of the background information concerning the parties' disputes.

³ Because several individuals sharing the last name Borstein are involved in the events relating to this appeal, we refer to them by their first names, not out of disrespect but for convenience and clarity. (*Cruz v. Superior Court* (2004) 120 Cal.App.4th 175, 188, fn. 13.)

with a 1 percent interest; the remaining 99 percent interest was held by Alfred as trustee of the trust.

On August 8, 2003 Alfred modified his estate plan. He appointed his niece, Stein, and his sister, Alice Ulman, as cotrustees of the trust and created Borstein Management LLC. Borstein Management's members were Stein, Ulman, Selma Seps, another of Alfred's sisters, and James M. Fuller, who acted as managing member. At the same time, Alfred transferred his 1 percent interest in Borstein Partners to Borstein Management.

Norma served as Alfred's caregiver for a number of years. After she married Alfred in October 2003, Stein and Ulman filed a petition for conservatorship over Alfred on the ground he was suffering from dementia. Stein and Ulman were appointed temporary conservators. With court approval, they then filed a petition for the annulment of the marriage between Alfred and Norma.

Norma settled with Alfred's relatives in January 2004. The settlement agreement, approved by the court on March 12, 2004, provided for the appointment of a professional conservator of Alfred's person and estate; the conservator was given the power to manage Alfred's care and treatment, determine his residence and control his visitation. Stein and Ulman agreed to dismiss their petition for annulment of the marriage between Alfred and Norma. In consideration for this dismissal, Norma waived all of her rights to Alfred's estate.

Alfred died on March 25, 2004. Beginning in December 2004 Norma instituted multiple attacks on the settlement agreement, direct and indirect. Her motion to set aside the agreement was denied, as was a motion for reconsideration of that order. Norma's appeal from the denial of the motion for reconsideration was dismissed for failure to file an opening brief. Norma also unsuccessfully brought a petition for probate alleging Alfred had died intestate and she was his heir at law.

Disregarding the terms of the settlement agreement, Norma attempted to control and profit from assets in Alfred's estate and trust. Norma recorded documents with the Los Angeles County Recorder's Office, the Clark County Recorder's Office in Las

Vegas, Nevada, and the Maricopa County Recorder's Office in Arizona, claiming to be Alfred's surviving spouse and the sole general partner of Borstein Partners and asserting an interest in the assets of the Alfred J. Borstein Trust.

2. Norma's Wrongful Death and Medical Malpractice Lawsuit

In June 2005, acting in propria persona, Norma filed a civil action against Stein, her husband Dr. Jay Stein, Borstein Management, Ulman and Seps alleging causes of action for conspiracy to cause wrongful death and complicity in causing wrongful death against all defendants except Jay Stein and alleging a separate cause of action against Jay Stein for medical malpractice. After a demurrer was filed, Norma retained the Law Offices of Edgardo M. Lopez to represent her. Lopez assigned his associate Reyes to handle Norma's case. Several additional iterations of the complaint were thereafter filed with various new causes of action added, including claims for elder and dependent adult abuse and neglect. Ultimately Stein, Borstein Management, Ulman and Seps moved for judgment on the pleadings on the ground Norma had no standing to maintain her causes of action because she had waived all her rights as Alfred's surviving spouse or successor in interest in the settlement agreement.

The probate court, to which the matter had been assigned, granted the motion. In an unpublished opinion Division Four of this court affirmed in part and reversed in part, concluding Norma had standing to pursue her own causes of action for wrongful death, breach of contract and intentional infliction of emotional distress but had waived her right to bring any survivor causes of action, including an action for elder abuse, because she gave up all interest in Alfred's estate and assets when she entered into the settlement agreement. (*Borstein v. Stein* (June 20, 2008, B195762) [nonpub. opn.])

3. The Injunction and Contempt Proceedings

In August 2006 the probate court issued a broad permanent injunction against Norma, declaring her filings relating to Borstein assets void and prohibiting her from contacting, collecting rent, maintaining any legal actions relating to, or interfering with the tenants of any properties owned by Borstein Partners, Borstein Management or the

trust. She was barred from acting on behalf of, holding herself out as or using names or titles on behalf of Borstein Partners, Borstein Management or the trust. All deeds, encumbrances, hypothecations, documents, filings, recordings or communications made by Norma and her agents, partners, successors, assigns or attorneys with respect to Borstein Partners, Borstein Management or the trust were declared void. Norma was subsequently held in contempt for violating the injunction. In an unpublished opinion Division Four of this court allowed execution of sentence of six of the 13 counts of contempt found by the probate court, but granted her petition for writ of habeas corpus as to the remaining counts. (*In re Norma Edwards Borstein on Habeas Corpus* (Feb. 27, 2008, B202813).) Lopez and Reyes represented Norma in connection with the injunction and contempt proceedings both in the probate court and on appeal.

4. *The Petition To Establish Title To Personal Property and the Special Motion To Strike the Petition*

On August 27, 2007 Stein, as trustee of the Alfred J. Borstein Trust, filed a verified petition to establish title to personal property, for an order confirming personal property to trust and for fraud, negligence, constructive trust, conversion, accounting and common counts. The petition named as respondents Norma; an individual named Amiya K. Goswami; Lopez and Reyes, both identified as attorneys who have represented Norma in various proceedings relating to Alfred's estate; Symetra Life Insurance Co. (Symetra), which had serviced the note secured by a mortgage on the trust's Nevada property and collected rent from the corporate tenant; and The Situs Companies (Situs), which had serviced the note secured by a mortgage on the trust's Arizona property and collected rent from its corporate tenant. The petition sought the return of personal property allegedly taken by Norma, Goswami, Lopez and Reyes with the negligent assistance of Symetra and Situs consisting of rent overages from the tenants of the Arizona and Nevada properties.

The petition alleged at various times in 2006 Norma had fraudulently stated to employees of Symetra and Situs she was Alfred's widow and successor, as well as trustee of his trust, and rent overages (that is, the amount of rent paid in excess of that needed to

service the respective notes and mortgages) should be sent to her. According to the petition, Symetra and Situs complied with Norma's requests; and, as a result, Norma took possession of the fraudulently diverted rent overages for her own use. Paragraph 65 of the petition alleges, "Petitioner is informed and believes and thereon alleges that Respondent Reyes and Respondent Lopez, and each of them, received a portion of the Situs rent overage as payment for legal services to Norma."

On October 5, 2007 Lopez and Reyes filed a special motion to strike the verified petition pursuant to section 425.16, asserting the claims directed to them in Stein's petition arose from acts in furtherance of their constitutional rights of petition and speech and Stein could not establish a probability of prevailing on those claims. The motion argued Stein's petition sought to recover damages, including punitive damages, and attorney fees against Lopez and Reyes "for acting as attorneys for and representing" Norma and characterized the allegations they knew or should have known monies used by Norma to pay their legal fees had been fraudulently obtained as "pretexts to Petitioner's efforts 'to chill' the valid exercise of the Constitutional rights of free speech and petition by Lopez and Reyes in representing Norma." Hearing on the special motion to strike was set for November 5, 2007.⁴

On October 26, 2007, the last day for filing an opposition to the special motion to strike, Stein filed a request for dismissal of the petition without prejudice. A clerk's dismissal was entered the same day. According to the subsequently filed opposition to the special motion to strike, almost immediately upon being served with the petition, lawyers for Symetra and Situs contacted Stein's counsel and began settlement negotiations. The petition was dismissed after Stein had settled with Situs and was near completion of a settlement with Symetra.

On November 5, 2007 counsel for Lopez and Reyes, in effect, agreed the substance of their motion to strike the petition was moot but argued they were entitled to

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Lopez and Reyes also demurred to the verified petition; the hearing on the demurrer was likewise set for November 5, 2007.

an award of attorney fees and costs notwithstanding the voluntary dismissal of the petition. The court set the matter for further hearing on December 10, 2007. On that date, although its tentative ruling had been to award \$4,000 in fees and costs to Lopez and Reyes, the court concluded it needed further briefing on the matter and directed Stein to file an opposition to the motion by December 31, 2007. After Stein's opposition was filed, Lopez and Reyes filed a reply in support of their motion, limiting their argument to the contention the court erred in permitting the late filing of the opposition papers.

On February 13, 2008, having previously taken the matter under submission, the court denied the motion for fees and costs because it would have denied the special motion to strike on the merits. The court explained, although the petition identifies certain allegedly unlawful activity by Lopez and Reyes while representing Norma (for example, "filing a perjurious petition for probate"), "[t]he thrust of the complaint against moving part[ies] focuses on their receipt of stolen funds from the trust, which is not a protected activity [A] moving party cannot prevail where allegations of protected activity are only incidental to a cause of action based on nonprotected activity."

Lopez and Reyes filed a timely notice of appeal.

DISCUSSION

1. Section 425.16: The Anti-SLAPP Statute

Section 425.16 provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)⁵ In ruling on a motion under section 425.16, the trial court engages in a two-step

⁵ Under the statute an "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under

process. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue,’ as defined in the statute. (§ 425.16 , subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon Enterprises*).)

In terms of the so-called threshold issue, the moving party’s burden is to show “the challenged cause of action arises from protected activity.” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 616, fn. 10.) “[T]he statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff’s cause of action itself was *based on* an act in furtherance of the defendant’s right of petition or free speech. [Citations.] ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e)’” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) There is no separate or additional requirement of proving the complaint was filed with intent to chill

consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).)

the defendant's exercise of constitutional speech or petition rights. (*Equilon Enterprises, supra*, 29 Cal.4th at pp. 58-67.) Nor must the moving party establish that the action had the effect of chilling free speech or petition rights. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 312.)

When a complaint or cause of action is based on multiple acts, some of which fall within the scope of section 425.16 and some of which do not (that is, it alleges both protected and unprotected activity as the basis for the claim), the complaint is subject to a special motion to strike unless the protected conduct is “merely incidental” to the unprotected conduct. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188 [“[w]e conclude it is the *principal thrust* or *gravamen* of the plaintiff's cause of action that determines whether the anti-SLAPP statute applies [citation] and when the allegations referring to arguably protected activity are only incidental to a cause of action based essentially on nonprotected activity, collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute”]; see *Gallanis-Politis v. Medina* (2007) 152 Cal.App.4th 600, 614; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672 [collecting cases]; see generally *Fox Searchlight Pictures, Inc v. Paladino* (2001) 89 Cal.App.4th 294, 308 [“a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one ‘cause of action’”].) Determining the gravamen of a claim requires examination of the specific acts of alleged wrongdoing, not just the plaintiff's general conclusions of breach. (See *Peregrine Funding*, at p. 672.)

Once the defendant establishes the statute applies, the burden shifts to the plaintiff to demonstrate a “probability” of prevailing on the claim. (*Equilon Enterprises, supra*, 29 Cal.4th at p. 67.) In deciding the question of potential merit, the trial court properly considers the pleadings and evidentiary submissions of both the plaintiff and the defendant, but may not weigh the credibility or comparative strength of any competing evidence. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714; *Wilson v. Parker, Covert &*

Chidester (2002) 28 Cal.4th 811, 821.) The question is whether the plaintiff presented evidence in opposition to the defendant's motion that, if believed by the trier of fact, is sufficient to support a judgment in the plaintiff's favor. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) Nonetheless, the court should grant the motion "'if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.'" (*Taus*, at p. 714; *Wilson*, at p. 821; *Zamos*, at p. 965.)

"The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue.'" (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928 (*Kajima*).) We review the trial court's rulings independently under a de novo standard of review. (*Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 325; *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1055.)

2. *Stein's Voluntary Dismissal of Her Petition Did Not Moot Lopez and Reyes's Special Motion To Strike*

After Lopez and Reyes filed and served their special motion to strike, Stein voluntarily dismissed her Probate Code section 850 petition to establish title and to confirm personal property to the trust. As the probate court ruled, voluntary dismissal of the petition prior to the hearing on the special motion to strike did not moot the special motion; the court was still obligated to determine if the motion was meritorious and to award attorney fees to Lopez and Reyes if they would have prevailed. "[A] defendant who is voluntarily dismissed, with or without prejudice, after filing a section 425.16 motion to strike, is nevertheless entitled to have the merits of such motion heard as a predicate to a determination of the defendant's motion for attorney's fees and costs under subdivision (c) of that section." (*Liu v. Moore* (1999) 69 Cal.App.4th 745, 751; accord, *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 917-919 [party has absolute right to voluntarily dismiss an action before a § 425.16 motion has been heard, but dismissal does not preclude the trial court from addressing whether the prevailing party should be awarded attorney fees]; *White v. Lieberman* (2002) 103 Cal.App.4th 210, 220 [order sustaining demurrer to complaint without leave to amend does not moot concurrently filed special motion to strike; prevailing defendant entitled to award of attorney fees].)

“[T]he trial court is required to rule on the merits of the motion, and to award attorney fees ‘when a defendant demonstrates that plaintiff’s action falls within the provisions of [section 425.16,] subdivision (b) and the plaintiff is unable to establish a reasonable probability of success.’” (*Pfeiffer Venice Properties v. Barnard* (2002) 101 Cal.App.4th 211, 218; accord, *Liu*, at p. 752; but see *Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94, 107 [“the trial court has discretion to determine whether the defendant is the prevailing party for purposes of attorney’s fees under . . . section 425.16, subdivision (c),” following voluntary dismissal of complaint].)

3. *Lopez and Reyes Failed To Meet Their Threshold Burden To Show the Gravamen of Stein’s Petition Challenged Acts in Furtherance of Their Right of Petition or Free Speech*

As Lopez and Reyes observe, filing a lawsuit is an exercise of the constitutional right to petition by both the client and the client’s lawyer and is protected petitioning activity within the meaning of section 425.16, subdivision (b)(1). (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733-735; *Navellier v. Sletten*, *supra*, 29 Cal.4th at pp. 88-89; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115.) Because Stein’s petition sought to recover personal property (money) fraudulently diverted from Alfred’s trust and paid to Lopez and Reyes as attorney fees incurred as a result of their legal representation of Norma, they contend the causes of action directed to them arose from this protected petitioning activity. At the very least, they argue, the act of receiving attorney fees is conduct in furtherance of a right to petition, noting that the only reason they were sued by Stein is that they had acted as Norma’s counsel in litigation involving Alfred’s estate.

Although Lopez and Reyes are correct the petition relates, at least in general, to their representation of Norma, the claims they improperly received assets belonging to the trust and seeking to recover that property are not “*based on* an act in furtherance of the defendant’s right of petition or free speech.” (*City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 78.) Whether Lopez and Reyes in fact knowingly received fraudulently diverted trust assets was at issue and formed the basis for the petition; what services they

may have performed to earn the fees paid with those assets was not. To be sure, the petition refers to Lopez and Reyes's representation of Norma in litigation involving Alfred's estate and trust. But those references simply provide background context and evidence of their purported misconduct regarding trust assets. (See *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1399 [State Farm's argument the complaint was subject to special motion to strike "clearly confuses acts of alleged misconduct with the evidence needed to prove them"].) They do not transform the principal thrust of the petition to establish title and confirm personal property or its causes of action for conversion, fraud and negligence, which do not involve protected speech or petitioning activity, into an action that is properly the subject of a section 425.16 special motion to strike. (See *Martinez v. Metabolife Internat., Inc.*, *supra*, 113 Cal.App.4th at p. 188; see also *Kajima*, *supra*, 95 Cal.App.4th at p. 929 [although amended cross-complaint included allegations that Kajima threatened to file suit if claims were not paid, such references to protected petitioning activity were simply part of City's allegations regarding Kajima's pattern and practice of bidding and collecting on public construction work projects and "plainly [were] not the basis for liability asserted in any of the causes of action in the City's amended cross-complaint"].)

The gravamen of the claims in Stein's probate petition directed to Lopez and Reyes was not misuse of the courts or misconduct in any of the underlying litigation involving Norma and Alfred's estate or trust, but wrongdoing through their knowing involvement in the use of assets fraudulent diverted from the trust. Whatever merit those claims may have had, they were based on harm that allegedly occurred independently of the representation of Norma and thus do not arise from protected petitioning activity. Accordingly, the probate court properly denied Lopez and Reyes motion for attorney fees following Stein's voluntary dismissal of the petition.

DISPOSITION

The order denying the request for attorney fees is affirmed. Stein is to recover her costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.